

## INSIGHTS

## NLRB Revises Test for Evaluating Workplace Policies

August 8, 2023

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On August 2, 2023, in *Stericycle, Inc.* (*Stericycle*), the National Labor Relations Board (the Board) revised the test for determining whether an employer's workplace policies comply with the National Labor Relations Act (the NLRA). *Stericycle* reverses the Board's 2017 decision in *Boeing Co.* (*Boeing*), which outlined a balancing test between a policy's impact on a worker's NLRA rights, and an employer's legitimate business justification for the rule. With *Stericycle*, the Board adopted a new test: specifically, could a worker reasonably read, or interpret, a workplace policy as restricting his or her NLRA rights? The *Stericycle* test is a modified version of the *Lutheran Heritage Village-Livonia* test, which *Boeing* superseded. However, unlike *Lutheran Heritage*, *Stericycle* creates a rebuttable presumption that a workplace policy is unlawful unless an employer can prove that the policy serves "legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule."

With *Stericycle*, the Board has shifted the burden to the employer to demonstrate the legitimate business need for a particular workplace policy. In contrast to the *Boeing* balancing test, now, when the Board reviews a policy, the burden to prove the policy's lawfulness immediately shifts to the employer if an employee could reasonably interpret a policy as having coercive meaning. Any policy that has a "reasonable tendency to chill employees from exercising their [collective bargaining] rights" may constitute an unfair labor practice and a violation of the NLRA—even if the rule could also be interpreted as not restricting workers' rights. The *Stericycle* test gives no weight to an employer's intent to restrict Section 7 rights.

The Board's justification for the new test is that "an economically dependent employee" is "inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." Thus, the Board will evaluate a workplace policy from "the perspective of the economically dependent employee who contemplates engaging in [collective bargaining] activity" because such review is "consistent with workplace reality . . . and with the employee-protective purposes of the [NLRA]."

In the NLRB press release announcing the *Stericycle* decision, NLRB Chairman Lauren McFerran said:

*Boeing* gave too little consideration to the chilling effect that work rules can have on workers' Section 7 rights. Under the new standard, the Board will carefully consider both the potential impact of work rules on employees and the interests that employers articulate in support of their rules. By requiring employers to narrowly tailor their rules to serve those interests, the Board will better support the policies of the National Labor Relations Act.

August 2, 2023 Press Release, National Labor Relations Board.

In dissent, Board Member Marvin Kaplan wrote that, with the *Stericycle* decision, the Board had “failed to discharge its duty” to strike “an appropriate balance between employee rights and legitimate employer interests.” Member Kaplan warns, for example, a rule “that subjects employees to discipline” for “unwillingness to work harmoniously with other employees” could be construed to restrict Section 7 activity because “a union-organizing campaign might occasion disharmony among employees.” Such a result, he writes, is inconsistent with the Board’s mandate.

### **Takeaways for Employers**

*Stericycle* has immediate and retroactive effect. Employers should review their existing policies with an eye toward whether those policies could reasonably be construed as restricting collective bargaining activity. Some examples of policies that may draw greater scrutiny include business information nondisclosure requirements, codes of conduct effectively calling for respectful or courteous conduct by employees and policies regulating social media use. Employers should also consider adding disclaimers to their employee handbooks explaining that their policies are not intended to restrict Section 7 activity, although the legal sufficiency of disclaimers in the post-*Stericycle* world remains unsettled.