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NLRB Issues Decision in *Stericycle, Inc.* and *Teamsters Local 628* Upending Legal Standards for Evaluating Employer Workplace Rules

The National Labor Relations Board (“NLRB”) recently set forth what appears to be a burden-shifting legal standard for determining whether an employer’s handbooks, policies or rules violate the National Labor Relations Act (“NLRA”). All employers should be mindful of this legal standard, whether an employer’s workforce is unionized or not, because the NLRA protects most employees irrespective of union membership.¹

Overview of Employee Rights under the NLRA

The NLRA protects employees when engaging in certain concerted activities, such as when two or more employees act together to improve the terms and conditions of their employment. Specifically, Section 7 of the NLRA guarantees employees “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.” Under Section 8(a)(1), it is an unfair labor practice for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the NLRA.

During the past several months, the NLRB has issued several employee-friendly decisions and memorandums.² Most recently, in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the NLRB determined that an employer’s facially neutral workplace rules, or rules that do not expressly violate the NLRA on their face, may nevertheless be “presumptively unlawful” when they have “a reasonable tendency to chill employees from exercising their Section 7 rights.” As discussed below, this new legal standard replaces a more employer-friendly “categorical approach” that had been set forth in *Boeing Co.*, 365 NLRB No. 154 (2017).

¹ The NLRA applies to most private sector employers, including manufacturers, retailers, private universities and healthcare facilities. The NLRA does not apply to federal, state or local governments, employers who employ only agricultural workers, and railroad and airline employees covered by the Railway Labor Act.

² See our prior client alerts about these decisions, available at [here](#), [here](#) and [here](#).

Boeing Co.: The Categorical Approach

In *Boeing Co.*, the NLRB categorized workplace rules in one of three ways when determining whether a facially neutral workplace rule violated the NLRA:

- Category 1 included rules that were considered lawful because they neither interfered with nor adversely impacted an employee's Section 7 rights.
- Category 2 included rules that warranted "individualized scrutiny" to determine whether they interfered with or adversely impacted an employee's Section 7 rights.
- Category 3 included rules that the NLRB designated as unlawful because they interfered with or adversely impacted an employee's Section 7 rights.

This categorical approach was designed to balance employee Section 7 rights against the employer's legitimate interests instead of "narrowly examining the language of a disputed rule."

Stericycle, Inc.: The Burden-Shifting Standard

In abandoning *Boeing's* categorical approach, *Stericycle* adopts a burden-shifting framework to determine whether a facially neutral workplace rule violates the NLRA.

As explained by the NLRB, the initial burden rests with the employee to show the challenged workplace rule "has a reasonable tendency to chill employees from exercising their Section 7 rights." Here, the NLRB interprets the workplace rule from the perspective of an objectively reasonable employee who is both economically dependent on their employer and contemplating engaging in Section 7 activity, but nevertheless wishes to comply with the challenged workplace rule. If the employee satisfies this initial burden, then the challenged workplace rule will be deemed "presumptively unlawful."

The burden then shifts to the employer to rebut the presumption by demonstrating "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." According to the NLRB, this burden shift offers the employer "something akin to an affirmative defense" and allows the employer to explain its legitimate and substantial business interest, show the challenged rule advances such interests, and why a more narrowly tailored rule would fail under the circumstances. If the employer satisfies this burden, then the challenged workplace rule would be deemed lawful.

This new burden-shifting method will be applied on a case-by-case basis. The NLRB will broadly "consider all important aspects of the problem posed by potentially overbroad work rules," such as "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 contrast to the categorical approach—which opposed the narrow examining of the language of a challenged workplace rule—the case-by-case approach here does just that.

Employer Takeaways

Employers should review their employee handbooks, policies and workplace rules from an employee’s point of view to ensure they cannot be interpreted to chill employees’ ability to exercise their Section 7 rights. If you have questions about how this new NLRB ruling affects your organization, including whether your employment policies, rules and handbook provisions are compliant with the NLRB’s recent rulings, please contact your Kutak Rock attorney or a member of the firm’s [National Employment Law Group](#).

