

NLRB Adopts New Framework to Evaluate Whether a Workplace Policy is Lawful

By Michelle De Oliveira on September 12, 2023



On August 2, 2023, the National Labor Relations Board (NLRB) adopted a new standard to evaluate whether employer workplace policies or rules infringe upon an employee's rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Under the new burden-shifting framework, employers must ensure that workplace policies are narrowly tailored and aligned with a legitimate and substantial business interest.

In its groundbreaking decision, *Stericycle, Inc. and Teamsters Local 628*, the NLRB changed the applicable legal framework when deciding whether a workplace rule may be interpreted to chill an employee's right to engage in concerted Section 7 activity [1] and therefore, be unlawful—overturning years of precedent under *Boeing*. [2]

Moving forward, the following burden-shifting framework will apply when evaluating whether a workplace policy is lawful or whether it chills an employee's right to engage in concerted activity (and is therefore, unlawful):

During the first stage, the NLRB's General Counsel must establish that the workplace policy "has a reasonable tendency to chill employees from exercising their Section 7 rights[]" to engage in concerted activity. At this stage, *Stericycle* tells us that:

- The NLRB will interpret the workplace rule "from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted.
- The "employer's intent in maintaining a rule is immaterial[]" and what matters is whether an employee could reasonably interpret the policy as having a coercive meaning.
- If an employee could reasonably interpret the policy as having a coercive meaning, the General Counsel will meet the initial burden—even *if* there is another reasonable interpretation of the workplace rule that is non-coercive.
- The workplace rule will be "presumptively unlawful" if the NLRB's General Counsel is able to meet the initial burden.

Then, if the General Counsel meets the initial burden and establishes that the workplace policy has a reasonable tendency to chill an employee's Section 7 rights, the burden shifts to employer to rebut the presumption by proving that:

- The rule advances a legitimate and substantial business interest; and
- The employer cannot advance that interest with a rule that is more narrowly tailored.

Employers must satisfy parts of the two-prong test to rebut the presumption and prevail in establishing that the workplace rule is lawful.

PROFESSIONALS

[Michelle De Oliveira](#)

PRACTICES

[Employment Law](#)

When determining whether a workplace rule is lawful, the NLRB will review the rule from the perspective of an employee who is subject to the rule and who is economically dependent on the employer-and under the presumption that the employee is contemplating engaging in protected concerted activity in relation with the workplace rule at issue. Workplace rules will be found to violate the NLRA if the employer's stated business interest for implementing the workplace rule could be achieved by a more narrowly tailored rule or policy.

The burden-shifting framework will require a case-specific approach and case-by-case analysis of: (a) the precise wording of the workplace rule or policy, (b) the industry and workplace context, (c) the employer interests being advanced, and (d) statutory employee rights that the policy may infringe.

As with many of its decisions, the NLRB will apply the *Stericycle* burden-shifting framework retroactively-which in turn means that workplace policies or rules may be subject to this analytical framework *even if* they were created *before* the NLRB issued this decision.

This burden-shifting framework starkly differs from the previously applicable framework under *Boeing*. In *Boeing*, the NLRB adopted a categorial approach to determine whether a workplace policy was lawful based on the subject matter. However, in *Stericycle*, the NLRB highlights that the prior analysis under *Boeing* gave too much weight to the employer's interests and not enough consideration to the chilling effect that workplace policies can have on an employee's rights to engage in protected concerted Section 7 activity. Moreover, *Boeing* did not account for the employee's economic dependency on the employer.

Suffice it to say that the aftermath of *Stericycle* is significant. All employers (regardless of whether they have unionized employees) are encouraged to review their employee handbooks and workplace rules and policies to ensure compliance with this new standard-a standard that will create a difficult hurdle for employers. Indeed, to successfully rebut an allegation that a workplace policy is unlawful. **The employer must show that it could not have adopted a more narrowly tailored policy.** To that end, when reviewing handbooks and workplace policies, employers should consider whether workplace rules are: (a) ambiguous, (b) overly broad, (c) narrowly tailored, and (d) advancing a legitimate and substantial employer interest. Certain policies (e.g., confidentiality, discipline, investigations, social media usage, employee communications, or conduct outside of the workplace) may require close scrutiny-and the time is ripe for a comprehensive review.

Michelle De Oliveira is a shareholder of the firm and a member of the **Employment Law Group**. A significant aspect of Michelle's practice is devoted to providing businesses and human resources professionals with day-to-day employment law counsel and advice on issues such as, wage and hour, hiring practices, employee discipline, employee terminations, leaves of absence, allegations of discrimination or harassment, reasonable accommodation requests, and any other personnel-related issue that may arise. You can reach Michelle at mmd@riw.com or (617) 570-3533.

[1] Concerted activity describes interactions and shared conduct among co-workers concerning work-related issues. Some examples of concerted activity include employee discussions concerning wages, benefits, workplace safety, and working conditions; dissemination of information or documentation concerning working conditions; and collaboration among employees to discuss workplace terms and conditions with their employer, a government agency, or the media. Generally, the NLRA strongly protects an employee's right to engage in concerted activity in both union and non-union settings.

[2] The NLRB issued the Boeing decision in 2017

POSTED IN: **NEWS**

