

WISCONSIN WORKER-FRIENDLY NLRB CHANGES EMPLOYER WORK RULE STANDARD

LINDNER
&
MARSACK
ATTORNEYS AT LAW

On August 2, 2023, the National Labor Relations Board adopted a new standard for analyzing the legality of facially neutral work rules that do not expressly restrict employees' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA"). In *Stericycle Inc.*, 372 NLRB No. 113, the Board overruled the legal framework established by the Board in *Boeing Co.*, 365 NLRB No. 154 (2017), later clarified in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). In doing so, the Board adopted a standard by which the legality of a facially neutral work rule is determined by assessing whether the rule has a reasonable tendency to chill employees from exercising their Section 7 rights.

Section 7 of the NLRA states generally that employees have the right to unionize and to join together to advance their interests as employees. It also makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their rights.

The Boeing standard required the Board to evaluate two key factors when assessing the legality of facially neutral work rules maintained by employers: 1) the nature and extent of the potential impact on employees' NLRA rights, and 2) the employers' legitimate justifications associated with the work rule. The Boeing standard allowed the Board and administrative law judges to deem a work rule lawful simply because the employer had legitimate business justifications for implementing it.

In addition to this standard, the Boeing majority created a categorical classification system to provide greater clarity and certainty when evaluating the legality of work rules under the Boeing standard. Under this system, a facially neutral work rule would fall in one of three categories. Category 1 of the Boeing categorical classification system was designated for rules that did not interfere with employees' Section 7 rights or where the adverse impacts on Section 7 rights were outweighed by justifications associated with such rules. Facially neutral work rules in Category 1 were always lawful for employers to maintain. Work rules that were sometimes lawful to maintain, but which warrant scrutiny in each case, fell in

Category 2. Lastly, work rules that fell in Category 3 were always unlawful to maintain given that their impact on protected activity could never be justified by an employer.

In *Stericycle Inc.*, the Board recognized that the Boeing standard appropriately recognized that employer interests should factor into the Board's analysis, but criticized the interpretive principles adopted in Boeing as giving too little weight to employees' Section 7 rights and too much weight to employer interests in that it permitted employers to adopt overbroad work rules that chilled employees' exercise of their Section 7 rights.

To remedy this, the Board adopted a new standard that requires the General Counsel to prove a challenged rule has a reasonable tendency to chill employees exercise of their Section 7 rights. Under the *Stericycle Inc.* standard, the General Counsel will meet her burden if an employee could reasonably interpret the rule to have a coercive meaning, even if a contrary noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the employer's work rule is deemed presumptively unlawful. An employer then has an opportunity to rebut the presumption by proving that the rule advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Notably, the Board's decision states that under the *Stericycle Inc.* standard, facially neutral work rules will be interpreted 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 activity. As a result, the employer's interest in maintaining a work rule is immaterial to the determination of whether the rule is lawful.

In support of its departure from the Boeing standard, the Board clarified that the new standard still provides employers the necessary leeway to maintain rules of their own choosing to advance legitimate and substantial business interests. However,

these rules must be narrowly tailored to significantly minimize, if not altogether eliminate, their coercive potential. If employers do so, their rules will be lawful to maintain.

As the Board's decision in Stericycle Inc. applies to virtually all private-sector employers, regardless of whether their workplace is unionized, employers along with labor counsel should review and revise employer handbooks and policies to ensure that they are narrowly tailored and in compliance with the new standard established by the Board.

If you have any questions about this material, please contact Kristofor Hanson by email at khanson@lindner-marsack.com or Alexandra (Sasha) Chepov at achepov@lindner-marsack.com, or any other attorney you have been working with at Lindner & Marsack, S.C.



DEDICATED CONTACT

Daniel Finerty

414.226.4807

dfinerty@lindner-marsack.com