The Pendulum Swings Back: NLRB Targets Neutral Work Rules in Reversal of Prior Ruling

Audra Hamilton
ahamilton@mwlaw.com
(501) 688.8801

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Think over the policies in your handbooks. Do you have one that requires workplace civility ("thou shalt not be disrespectful or insubordinate to thine co-workers or supervisors")? Or one that requires that employees keep workplace investigations (such as sexual harassment investigations) confidential? Those facially neutral workplace rules would have been considered automatically reasonable and not subject to challenge under the National Labor Relations Act ("NRLA") in recent decisions of the National Labor Relations Board ("NLRB" or "Board"). But employers can no longer rest assured that such rules will be considered lawful after a decision issued by the current NLRB on August 3, 2023, in *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113 (2023).

Whiplash, anyone?

During the Trump era of the NLRB, the Republican-majority Board issued many employer-friendly decisions, some of which overruled prior, more employee-friendly standards. One of these decisions was Boeing Co., 365 NLRB No. 154 (2017), which created a new standard for evaluating whether facially neutral workplace rules interfere with employees' rights to bargain collectively or engage in other concerted activities for mutual protection in the workplace. Overhauling its standard from 2004—which held that neutral work rules violated the NLRA if employees could "reasonably construe" the rule to impair exercise of rights under the NLRA—the *Boeing* Board looked at (1) the nature and impact of the rule on NLRA rights, and (2) whether the employer had legitimate justifications for the rule. The Board went a step further, creating a category in which workplace rules would always be considered reasonable. During that period of the Board, the NLRB recognized the following as categorically reasonable workplace rules (among others): restriction of camera use in the workplace, workplace civility rules, confidentiality requirements for workplace investigations, rules prohibiting outside employment, and confidentiality rules for proprietary information.

The tides have unquestionably turned under the now-Democratic-majority NLRB and the tenure of Biden-appointed NLRB General Counsel, Jennifer Abruzzo. Shortly after her appointment in 2021, GC Abruzzo issued a memorandum announcing the intention to challenge several of the Board's decisions from the prior administration, including the *Boeing* decision. On August 3, 2023, the Board followed through with one of GC Abruzzo's goals, reversing the *Boeing* decision with its *Stericycle* decision.

The New (Old) Standard

Under *Stericycle*, the Board largely returned to the standard that existed prior to the Trump-era NLRB, with some modifications. Now, facially neutral workplace rules will violate the NLRA if the rules have a reasonable tendency to "chill" employees from engaging in protected activity, as viewed from the perspective of an employee who contemplates engaging in protected activity. This is generally the standard that existed pre-Boeing. However, noting that *Boeing* failed to take into account the economic dependency of workers on employers, the NLRB expanded its holding: if an employee could reasonably interpret a rule to restrict protected activity, the rule is presumptively unlawful "even if the rule could also be reasonably interpreted **not** to restrict" rights under the NLRA.

Once the General Counsel establishes that a work rule could reasonably be interpreted to interfere with rights under the NLRA, the employer may rebut the presumption of invalidity by showing that it has a legitimate and substantial business interest in the rule that "cannot be accomplished with a more narrowly-tailored rule." Gone are any categorically legal rules; all rules will be interpreted on a case-by-case basis.

NLRB Target Areas

The work rules at issue in *Stericycle* related to personal conduct (civility), conflicts of interest, and confidentiality of harassment complaints. While the NLRB did not make a final determination as to whether those work rules were unlawful under the *Stericyle* standard (the case was sent back to the administrative judge to review with the new standard in mind), these types of rules were targeted by GC Abruzzo in her initial memorandum in 2021 as ones that she intended to scrutinize more heavily. It is reasonable to believe that similar rules will continue to be targeted by the NLRB.

The *Stericyle* decision also noted several other types of workplace rules that had been found categorically lawful under the *Boeing* standard. Although not stating outright that they would be deemed presumptively unlawful now, employers should expect that these rules may be under scrutiny after *Stericycle*: no-recording rules, confidentiality for proprietary information, non-disparagement, restriction of employee use of the internet and social media, prohibition of outside employment, and rules allowing search of employee property.

It should also be noted that the *Stericyle* standard is retroactive, which means that a workplace rule that was promulgated before *Stericycle* was issued will still be subject to potential attack, even though it might have been presumptively lawful under *Boeing* when the rule was put into place.

Key Takeaways

- This decision applies to unionized and non-unionized workforces alike. Do not ignore the effect of this decision simply because you do not have unionized labor.
- Employers should review their handbooks and other neutral workplace rules and evaluate whether any rules could be interpreted as chilling employees' rights under the NLRA. In the evaluation, consider whether the rule restricts (or could restrict) an employee's ability to talk about workplace conditions.
- Be clear on the legitimate and substantial business interest for the rule. The stronger the case for that interest, the more likely it will be upheld. Also consider whether there is a narrower way to tailor the rule to accomplish the business objectives.
- Expect continued scrutiny from this NLRB. This is the latest in a string of decisions that have changed workplace rules in the last two years.