

Alert | Labor & Employment



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NLRB Reverts to Heightened Legal Standard in Reviewing Employee Handbook Policies

Go-To Guide:

- Employee handbook policies violate Section 8(a)(1) of the National Labor Relations Act if they have a “reasonable tendency” to dissuade workers from engaging in organizing activity.
- A handbook provision must 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.”
- The new rule applies retroactively.

In a trail of decisions turning back the clock to precedent under the Clinton-era Board, the National Labor Relations Board (NLRB) has reversed the standard of review for employee handbook policies. Specifically, on Aug. 2, 2023, the NLRB issued a split ruling in *Stericycle, Inc. and Teamsters Local 628*, holding that employee handbook policies violate Section 8(a)(1) of the National Labor Relations Act (NLRA) if they have a “reasonable tendency” to dissuade workers from engaging in organizing activity, such as discussing concerns with coworkers. Because this standard will likely result in closer scrutiny of employee handbooks, employers may wish to examine their handbooks and policies for compliance under the *Stericycle* standard.

Previously, the standard established by *Boeing Co.*, 365 NLRB No. 154 (2017) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019) required the Board, when examining a ‘facially neutral’ work rule, to evaluate: “(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.” In contrast, the NLRB majority in *Stericycle* held that if a rule did not explicitly restrict NLRA-protected activities, a violation “is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

Under *Stericycle*, a handbook provision must 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.” Thus, “if an employee could reasonably interpret the rule to have a coercive meaning,” the provision is presumptively unlawful “even if a contrary, noncoercive interpretation of the rule is also reasonable.” The employer may rebut that presumption by proving that the handbook provision advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. This framework imposes a case-by-case approach as opposed to the more categorical approach under *Boeing* and *LA Specialty*.

The new rule applies retroactively, so even those employee handbooks drafted and implemented before the *Stericycle* decision are subject to this heightened level of scrutiny.

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