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## For Your Information<sup>®</sup>

### **NLRB adopts new standard for evaluating workplace rules and handbook policies**

In a split ruling on August 2, the NLRB made it harder for employers to defend seemingly neutral workplace rules. Reversing a more employer-friendly Trump-era standard, the Board will now presume such rules are unlawful if a worker could interpret them as reasonably restricting their rights, even if they could be interpreted otherwise.

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#### Background

In its 2004 *Lutheran Heritage Village-Livonia* decision, the National Labor Relations Board (“NLRB” or “Board”) held that employers may violate the National Labor Relations Act (NLRA or Act) just by maintaining facially neutral workplace rules, policies, and employee handbook provisions (collectively “work rules”) that employees might “reasonably construe” to restrict their ability to engage in activity protected by the Act. The Obama Board applied this standard broadly to strike down work rules if they *could* — rather than *would* — be interpreted to interfere with the exercise of NLRA rights.

In 2017, the NLRB established a new standard to evaluate facially neutral work rules. In its decision in *The Boeing Company*, the Trump Board replaced the “reasonably construe” standard from *Lutheran Heritage* with a two-factor balancing test that weighed employees’ rights to engage in concerted workplace activity (“Section 7 rights”) against employer business interests in maintaining discipline and productivity. *Boeing* also delineated three categories of work rules to provide “far greater clarity and certainty” to employees, employers, and unions:

- Category 1: Lawful to maintain
- Category 2: Warrant individualized scrutiny
- Category 3: Unlawful

Enforcement guidance from the Board's General Counsel addressed the placement of common handbook rules into *Boeing's* three categories and instructed regions analyzing claims to consider whether the challenged rules *would* — rather than *could* conceivably — be interpreted to interfere with the exercise of NLRA rights. (See [June 21, 2018 FYI](#).)

## NLRB reverses course

In a split ruling on August 2, the Biden Board reversed course, changing the standard for determining whether a seemingly neutral work rule is unlawful. Rejecting the *Boeing* balancing test as giving “too little weight to the burden a work rule could impose on employees’ Section 7 rights” and too much weight to employer interests, the majority in *Stericycle, Inc.*, revived the *Lutheran Heritage* standard — but with a twist.

Under the Board's new test, a rule may be illegal if it has a “reasonable tendency to chill employees” from exercising their Section 7 rights. The Board will make that determination from the perspective of a worker who is “economically dependent” on the employer and “who also contemplates engaging in protected concerted activity.” The majority dismissed the employer's intent as “immaterial,” saying the only thing that matters is whether a worker “could reasonably interpret the rule to have a coercive meaning.”

While the Board will presume that facially neutral work rules are unlawful if a worker *could* reasonably interpret them to restrict their rights, the presumption is rebuttable. Employers may rebut the presumption by proving that the rule “advances a legitimate and substantial business interest” that cannot be achieved with “a more narrowly-tailored rule,” which may prove a difficult burden to meet.

Scrapping *Boeing's* category-based approach, the Board's newly adopted standard will assess facially neutral work rules on a case-by-case basis. In making those assessments, the Board will examine “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.” Ambiguous rules will be construed against the employer. The Board indicated that this new standard, which affects both unionized and nonunionized workplaces, is to be applied retroactively to all pending cases.

## In closing

Post-*Stericycle*, employers can expect increased scrutiny and less predictability regarding the legality of facially neutral work rules. Employers should re-examine and update their workplace rules, policies, and handbook provisions as needed in light of the Board's new standard.

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