

## Employment & Labor Law Alert

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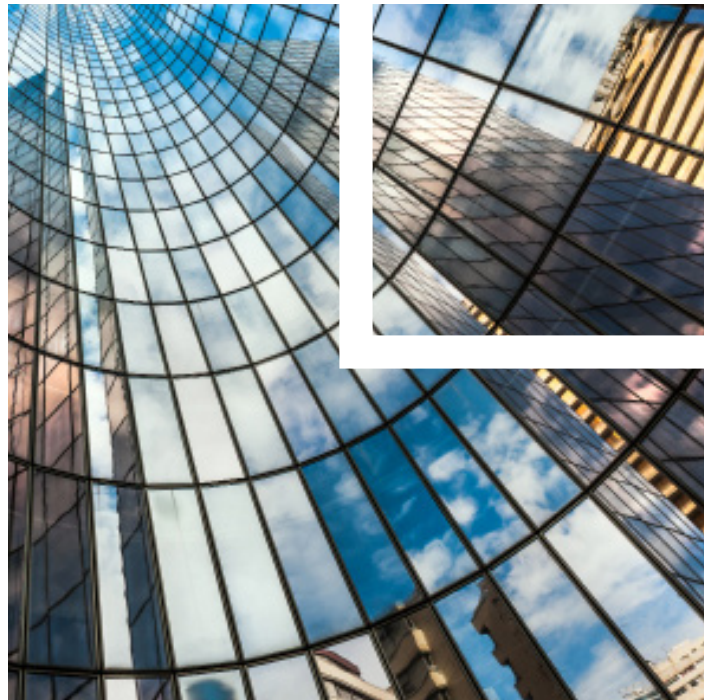
# NLRB Adopts Stricter Standard for Evaluating Challenged Workplace Rules

On Aug. 2, in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the National Labor Relations Board (NLRB) adopted a strict new legal standard for assessing the validity of workplace rules under the National Labor Relations Act (NLRA). This decision applies to all companies covered by the NLRA, which are the vast majority of employers in the United States. Specifically, in *Stericycle*, the NLRB held that employee handbook policies violate Section 8(a)(1) of the NLRA if they have a “reasonable tendency” to dissuade workers from engaging in organizing activity, such as discussing concerns with co-workers. It also held that 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.” This new rule applies retroactively.

Because this standard will likely result in closer scrutiny of employee handbooks, employers should consider having their handbooks and policies reviewed for compliance under the *Stericycle* standard.

### Prior Standard

The NLRB majority in *Stericycle* overruled the standard established in *Boeing Co.* and *LA Specialty Produce Co.*, which 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) [the employer’s] legitimate justifications associated with the rule.” *Boeing* overruled the prior test in *Lutheran Heritage Village-Livonia*, which found workplace rules facially unlawful if an employee could reasonably interpret a work rule to restrict Section 7 activity (which protects employees’ rights to engage in concerted activities) and without general consideration of employers’ interests. The *Lutheran Heritage* test led to considerable uncertainty



and different litigation outcomes based on similar policy language, which *Boeing* for the most part eliminated. In *Stericycle*, however, the NLRB found that the standard established in *Boeing Co.* (and later refined in *LA Specialty Produce Co.*) allowed employers to adopt overly broad work rules that chill employees’ exercise of their rights under Section 7.

### New *Stericycle* Standard

In *Stericycle*, the NLRB found that the employer violated the NLRA by maintaining certain rules for its employees that addressed personal conduct, conflicts of interest and confidentiality of harassment complaints. It established a new standard to assess whether a work rule violates the NLRA, finding that “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 NLRB also stated that the work rule 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 employer may rebut that presumption by proving that the handbook provision

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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.

### Employer Impact

As a result of the new standard established by *Stericycle*, all employers (unionized and nonunionized) should:

1. Expect significantly more challenges to their work rules and disciplinary actions.
2. Reexamine their work rules (especially confidentiality rules, social media policies, conflict of interest policies, and disciplinary rules and policies) to determine if adjustments or disclaimers should be made to rules that appear to be in violation of the new *Stericycle* standard.
3. Provide training to human resource and management personnel on applying the new work rules to ensure discipline decisions do not violate the NLRA.

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