

CLIENT ALERT: New NLRB Decision Forces Employers To Reevaluate Policies Under New Employee-Friendly Standard

The National Labor Relations Board (the “Board”) has changed its position in yet another matter – this time turning its focus on employment policies for all employers, including employers with no union workers. On August 3, 2023, the Board reversed its own 2017 decision and created a new framework for evaluating whether a written employment policy constitutes an unfair labor practice in violation of the National Labor Relations Act (“NLRA”). The Board’s new *Stericycle, Inc.* decision created an employee-friendly framework that makes an employment policy presumptively unlawful if the policy could be reasonably interpreted to chill an employee’s rights under Section 7 of the NLRA. That interpretation must be made from the viewpoint of a lay employee. An employer can only rebut that presumption if the employer proves that the policy advances a legitimate, substantial business interest and that the employer cannot advance that interest with a narrower rule.

Employers with written employment practices should reevaluate their employment practices in light of this new framework. Additionally, employers should adopt an additional prophylactic policy explicitly stating the employer’s policies should not be interpreted as restricting Section 7 rights.

While Board decisions typically only concern unionized workplaces, this decision affects any workplace with written employment policies regardless of the presence of a union. This is yet another action from the Board that affects all employers, similar to its recent scrutiny of *non-compete agreements* and *confidentiality and non-disparagement provisions* in severance agreements.

Legal Background

Both union and non-union employees have rights under Section 7 of the NLRA. Section 7 rights include the right to form, join or assist unions and the right to join together as employees to advance their interests as employees. An employer commits an unfair labor practice in violation of the NLRA by interfering with, restraining, or coercing employees in exercising Section 7 rights. Clearly, an employer’s policy to terminate all employees who join a union constitutes an unfair labor practice. However, the analysis becomes more challenging when a broad, facially neutral policy may prohibit the exercise of Section 7 rights. For example, an employer may adopt a broad confidentiality rule that forbids employees from discussing “confidential employee information.” If “confidential employee information” covers what the employer pays each employee, that policy may restrict Section 7 rights because Section 7 protects employees who discuss their compensation with other employees.

The Board’s standard for evaluating facially neutral policies has changed over the years. Under the Board 2017 *Boeing decision* and subsequent *Board General Counsel Memorandum*, the Board sought to increase clarity regarding when neutral policies run afoul of Section 7 rights by adopting categorical rules. For example, rules banning workplace recordings were presumptively lawful while rules requiring confidentiality about wages were unlawful. The *Boeing* decision in turn had

substantially revised a previous Board decision, *Lutheran Heritage Village-Livonia*.

New Decision

In *Stericycle*, the Board moved away from *Boeing*'s predictable, categorical approach in favor of a more nebulous burden-shifting approach similar to its prior *Lutheran Heritage* standard.

Under the *Stericycle* standard, the Board must first prove that the challenged employment policy has a "reasonable tendency to chill" employees from exercising Section 7 rights. Importantly, this "reasonable tendency" is taken from the perspective of a lay employee who seeks to engage in Section 7-protected activity, rather than from a purely objective standard. If this standard is met, the policy is presumptively unlawful.

An employer may only rebut this presumption if the employer proves that the rule advances a legitimate and substantial business interest and that the employer cannot advance that interest with a narrower rule. Such a standard is not likely to be easily met.

What Employers Should Do

The shift from the predictable standard in *Boeing* to the more rigorous standard in *Stericycle* puts increased scrutiny on all employer policies. Employers should reevaluate written policies under this new standard, particularly policies that touch on confidentiality and workplace communications. Employers should err on the side of more narrowly construed policies rather than broad or intentionally ambiguous policies.

Additionally, employers should adopt a policy that details employees' rights under Section 7. That policy should state that no rule adopted by the employer should be interpreted as restricting Section 7 rights. Such a policy will strengthen an employer's position that its policies cannot reasonably be interpreted as chilling an employee's Section 7 rights. While the Board's decision in *Stericycle* was silent on the value of these prophylactic policies, the Board's General Counsel has **taken the position** that such policies should create a presumption that an employer's rules are lawful.

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