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NLRB Puts the Microscope on Employee Handbooks

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Recently, the National Labor Relations Board (NLRB) [issued its decision](#) in *Stericycle Inc.*, which changes the analysis for evaluating work rules challenged under Section 8(a)(1) of the National Labor Relations Act (NLRA).



In order to fully understand the impact of this decision, we must go back to some prior decisions by the NLRB in order to analyze how the law in this area has evolved.

In 2004, the NLRB issued its decision in *Lutheran Heritage Village-Livonia*, which held that “employers violated the NLRA by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities if the rules would be ‘reasonably construed’ by an employee to prohibit the exercise of NLRA rights.”

In 2017, the NLRB issued its decision in *Boeing Co.*, which replaced the “reasonably construed” standard in favor of a two-step analysis that considers: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The decision also created three categories of rules: Category 1 (those that the Board designates as lawful), Category 2 (those that warrant individualized scrutiny), and Category 3 (those that the Board designates as unlawful). In 2019, the NLRB issued its decision in *LA Specialty Produce Co.*, which built on the *Boeing Co.* case and held that Confidentiality/Non-Disclosure and Media Contact provisions were categorized as generally lawful.

That brings us to this latest decision. In *Stericycle Inc.*, the NLRB specifically overruled *Boeing Co.* and *LA Specialty Produce Co.* It replaces the two-step analysis from *Boeing Co.* in favor of a revised version of *Lutheran Heritage Village-Livonia* that considers whether the rule has a “reasonable tendency” to chill employees from exercising rights. If the General Counsel is able to prove so, then there is a presumption that the rule is unlawful. The employer can rebut that presumption by proving that the rule “advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.” Importantly, *Stericycle Inc.* eliminates the categorical approach in favor of case-specific analysis.

What Should Employers Do Now?

Employers should review their current employee handbooks for rules that might be out of compliance with the NLRB decision and make any necessary revisions. Further, employers should monitor future NLRB decisions on

this topic, as this issue has been heavily litigated in recent years and we tend to see the pendulum swing with changes in the administration.

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