

# Electronic Alert

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## NLB Adopts New Standard for Assessing Unlawful Workplace Rules

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On August 2, 2023, in its [decision](#) in *Stericycle Inc.*, the National Labor Relations Board (NLRB) adopted a new legal standard for evaluating workplace rules. Now, when an employer’s rule or policy is challenged, the NLRB’s General Counsel must prove that the rule has a reasonable tendency to chill employees from exercising their rights under Section 8(a)(1) of the National Labor Relations Act (NLRA). The NLRB explained that “an employer’s intent in maintaining a rule is immaterial.” Rather, if an employee could reasonably interpret the work rule to have a coercive meaning, then the General Counsel will meet their burden of proof. If the burden is met, the rule is presumptively unlawful.

The employer may rebut this presumption by proving that the rule advances a legitimate and substantial business interest, and a more narrowly tailored rule would fail to advance that interest. If the employer is successful in proving its defense, the work rule is lawful to maintain.

One of the policies at issue in *Stericycle Inc.* restricted employees’ use of personal cell phones to break time and required that these devices be stored in lockers during work hours. The Administrative Law Judge (ALJ), who heard the case prior to it going to the NLRB for review, found this policy to be lawful and not an explicit restriction of Section 7 activity. Another policy prohibited employee conduct “that maliciously harms or intends to harm” the company’s business reputation. The ALJ found this policy was unlawful because it was vague and included a threat of discipline or termination. This combination was likely to cause employees to “reasonably construe the rule to prohibit Section 7 activity, in violation of Section 8(a)(1).” The NLRB directed the ALJ to reconsider the case, applying the new standard.

The NLRB’s decision rejects prior case law that used a categorical approach to assessing work rules and replaces it with a standard requiring “a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them.” The new standard builds on and revises the *Lutheran Heritage* standard and overrules *Boeing Co.* (2017) and *LA Specialty Produce Co.* (2019).

When drafting or revising workplace rules, policies, and handbooks, employers subject to the NLRA should consider whether a reasonable employee could interpret the rule as interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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