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NLRB ADOPTS NEW STANDARD FOR ASSESSING LAWFULNESS OF WORK RULES

For a number of years, the NLRB has applied various standards in its review of employer work rules that are alleged to violate Section 8(a)(1) of the Labor Management Relations Act ("Act"). That section makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act, namely the right to form, join or assist unions, to bargain collectively and to engage in concerted activities. Under the Trump Board, the employees' concerns were given relatively little weight in comparison to an employer's purported justification for a work rule. Moreover, that Board viewed certain categories of rules as generally applicable to all employers, regardless of the nature of the workplace.

Yesterday, in *Stericycle, Inc. and Teamsters Local 628*, the Board overruled the Trump Board's approach to work rules and held that it would "begin its analysis by assessing whether the General Counsel has established that a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights," and in doing so would "interpret the rule from the perspective of the reasonable employee." If that employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the rule will be deemed as violating the Act unless the employer can prove 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."

Significantly, the Board also rejected the Trump Board's approach to holding certain types of work rules always lawful to maintain, regardless of their workplace setting. Instead, it held that all such rules would have to be analyzed on a case-by-case basis which examines the specific language of particular rules and the employer interests actually invoked to justify them. Thus, even if a particular rule might be deemed legal for one employer, it would not automatically be upheld for a different employer whose needs do not meet those of the other employer.

In a footnote to that opinion, the Board cautioned that "The approach we adopt here applies only to facial challenges to the maintenance of work rules that do not expressly apply to employees' protected concerted activity. We do not change existing law that an employer's maintenance of a work rule will be deemed unlawful when it explicitly restricts Sec. 7 activity or was promulgated in response to union or other protected concerted activity." For example, the Board stated, a rule prohibiting contacting customers concerning union issues would still be deemed unlawful because it explicitly restricts Section 7 activity.

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