

Unions Gain an Organizing Edge: NLRB Lowers Bar for Challenging Work Rules

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The National Labor Relations Board (“NLRB”) has significantly lowered the bar for unions and employees who seek to challenge the validity of work rules, particularly those related to civility, solicitation, confidentiality and privacy. While the new standard is unlikely to lead to significant new financial liability, it has the potential to be used by unions as an organizing tool, making it much easier for unions seeking to organize employees to bring charges that can be used as campaign fodder or to derail elections.

In *Stericycle Inc.*, 372 NLRB No. 113 (Aug. 2, 2023), the NLRB announced that it was abandoning the *Boeing* standard, under which many rules were presumptively valid and others were upheld so long as on balance the employer’s legitimate interests outweighed any potential “chilling effect” on protected concerted activity by employees. Instead, the NLRB is reverting to a modified version of its *Lutheran Heritage* doctrine. As modified, the NLRB will now invalidate any rule which an “economically dependent employee considering taking concerted action” could reasonably view as prohibiting the protected conduct, subject to an affirmative defense that the rule supports a legitimate employer interest and does so in the least restrictive manner possible. Note, the “economically dependent employee” is a hypothetical construct, like the “reasonable person,” and the comments suggest the board will view the rule through the eyes of your most easily intimidated employee. No actual effort to engage in protected conduct or actual enforcement of the rule against protected conduct even needs to be alleged. Rather, the new standard is all about facial challenges to rules in the abstract.

Under the now reinstated *Lutheran Heritage* standard, the NLRB frequently invalidated rules that to the casual observer would seem wholly innocuous, including rules:

- Requiring employees “to behave in a professional manner that promotes efficiency, productivity and cooperation”
- Prohibiting the making of false statements about the company
- Prohibiting discourteous and inappropriate behavior toward co-employees
- Suggesting that employees “work harmoniously” and in a “professional manner”
- Requiring employees to keep customer and co-employee information private

Such rules will now survive a charge only if the employer can prove that its particular rule was the least restrictive way of enforcing an articulable and legitimate employer interest.

The new decision puts a premium on reevaluating written work rules and policies related to employee conduct. The analysis should cover whether the particular rule is currently necessary or merely a drafting artifact; identify what employer interest(s) the rule seeks to protect; and ascertain whether the manner in which the rule is stated is sufficiently narrow to exclude the possibility of its application to protected concerted activity.

Please contact your Miller Canfield attorney or one of the authors of this alert for further information and advice on maintaining workplace order in light of the new decision.