

National Labor Relations Board Begins Anticipated Union-Friendly Shift

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Last month, the National Labor Relations Board (NLRB) issued a long-awaited decision in *Stericycle Inc.* adopting a new legal standard to determine whether a company policy or workplace rule is facially unlawful under Section 8(a)(1) of the National Labor Relations Act (NLRA), which protects employees' rights under Section 7 of the NLRA to engage in concerted, protected activity on matters relating to the terms and conditions of their employment. Under *Stericycle*, a company policy or workplace rule is facially unlawful if it has a "reasonable tendency to chill employees from exercising their Section 7 rights." Importantly, employers must now focus on whether the rule or policy has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity. The NLRB will interpret this rule from the perspective of a reasonable employee and by taking into account that employee's "economic dependency" on the employer. The employer's rationale for maintaining the rule is immaterial.

In an instance where an employer's policy is presumed unlawful, the employer may rebut the presumption of unlawfulness 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. This is a departure from the more employer-friendly standard advanced under the prior NLRB under which, company policies were reviewed using a two-factor balancing test: (1) the workplace rule's nature and extent of potential impact on NLRA rights and (2) the legitimate justifications associated with the rule. The NLRB in *Stericycle* overturned this standard upon finding that it failed to account for employees' economic dependency and because it chilled the exercise of employees' Section 7 rights.

Stericycle represents the most recent volley in question that has ping-ponged between iterations of the NLRB under different administrations for years. However, this newest test expands beyond prior employee-friendly tests in two ways. First, the new rule prohibits conduct that could possibly (rather than would) be reasonably interpreted to limit employees' rights. Second, it explicitly incorporates

the perspective of an economically dependent employee who is contemplating engaging in protected activity into the analysis rather than a “reasonable” one.

In light of this shift, employers should carefully re-evaluate their employee handbooks and policies, and coordinate with their Vorys lawyer to ensure that those handbooks and policies are compliant. Moreover, this change was just the first of several in the last month from the NLRB, which will be covered in future *Vorys Client Alerts*.