

ALERTS

Employment Law Updates

September 12, 2023

The NLRB Flip-Flops Again on Work Rules and Handbook Policies

On Aug. 2, 2023, the National Labor Relations Board (“NLRB”) adopted a new standard for assessing the legality of workplace rules and handbook policies that affect employees’ rights under Section 7 of the National Labor Relations Act (“NLRA”). The NLRA applies to *both* unionized and non-unionized employees, and protects employees’ rights to engage in protected concerted activities.

The NLRB’s decision in *Stericycle* overrules its prior 2017 decision in *Boeing*, which had provided employers greater flexibility in establishing workplace rules and handbook policies. The NLRB reasoned in *Stericycle* that this previous standard gave too much weight to employer interests and condoned overbroad work rules. Over the past 25 years, the NLRB has issued conflicting decisions on the applicable test for assessing facially neutral work rules. Under the new standard, facially neutral rules and policies are presumptively unlawful if they have a “reasonable tendency” to chill employees’ exercise of section 7 rights, which include the right to engage in activity for mutual aid or protection. This presumption is interpreted from the perspective of the employee, taking into account the employee’s economic dependence on an employer. The NLRB held that an employer’s intent in maintaining the rule is immaterial, and if an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumptively unlawful. The employer may rebut this presumption by proving the rule advances a legitimate and substantial business interest and the employer is unable to advance that interest with

a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

The new standard set forth by the NLRB will be applied retroactively. The decision adopted a case-by-case analysis and rejected prior decisions holding that certain rules and policies are lawful, such as confidentiality during ongoing investigations, no recording policies and rules prohibiting outside employment.

All workplace rules and handbook policies can be subject to legal challenge under the new standard. Employers should review their handbooks and try to narrowly tailor their rules and policies to support their business interests.

New Form I-9

US Citizenship and Immigration Services has issued a revised version of Form I-9 for Employment Eligibility Verification. The revised form is ready for use now and is available [here](#). Employers may use the current Form I-9 through Oct. 31, 2023. Starting Nov. 1, 2023, failure to use the new Form I-9 may result in penalties. The revised form, among other changes, includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a new alternate procedure, available only to employers enrolled in E-Verify.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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