

## NLRB Adopts Stricter Standard for Workplace Rules

Article By:

Brian J. Moore

Jared A. Phalen

---

This week, the National Labor Relations Board (“NLRB”) adopted a somewhat new standard for evaluating employer work rules when they are challenged as being “facially unlawful” under Section 8(a)(1) of the National Labor Relations Act (“NLRA”). This standard builds off the previous standard announced in *Lutheran Heritage Village-Livonia*.

As previously [reported](#) in June, NLRB General Counsel Jennifer Abruzzo urged the NLRB to adopt a new standard for workplace rules, which would be used to outlaw most non-compete provisions in employment contracts for chilling protected activities under the NLRA. With respect to workplace rules, the NLRB ultimately agreed with Abruzzo in its recent [decision](#). Now, workplace rules will have to be narrowly tailored to promote an employer’s legitimate and substantial business interest to survive scrutiny from the NLRB.

A workplace rule is now unlawful if the rule is reasonably construed to chill employees from exercising their right to concerted activity. Then, the burden shifts to the employer to show the work rule is narrowly tailored to protect its substantial and legitimate business interests. This new standard removes the process of placing rules in certain categories, like rules related to investigations and confidentiality. Under the NLRB’s previous standard, rules placed in these categories were always lawful to maintain. Now, the General Counsel must simply prove that any challenged work rule has a reasonable tendency to chill employees from exercising their rights. If this is done, then the rule is presumptively unlawful.

### ***What Employers Need to Know***

Employers will no longer be able to establish broad workplace rules governing employee’s conduct, especially rules involving an employee’s personal conduct, conflicts of interest and confidentiality of harassment complaints. Essentially, any rule established by an employer that effects its employees’ ability to talk to each other about issues or conditions in the workplace will have to be narrowly tailored. The intent of the employer does not matter as the NLRB will now focus on how employees interpret the rule itself.

Given the fact that the NLRB adopted General Counsel Abruzzo’s argument in *Stericycle, Inc.*, it

makes it even more likely that the NLRB will further apply this standard to non-compete agreements. While the workplace rules at issue in this decision did not involve non-compete agreements, General Counsel Abruzzo has already indicated her plan to argue that the *Stericycle* standard mentioned above should be used for non-compete agreements as well, based on her previous [memo](#) on the issue.

© 2024 Dinsmore & Shohl LLP. All rights reserved.

---

National Law Review, Volumess XIII, Number 216

Source URL: <https://www.natlawreview.com/article/nlrp-adopts-stricter-standard-workplace-rules>