



## NATIONAL LABOR RELATIONS BOARD UPDATE: THREE RECENT DECISIONS FOCUS ON PROTECTING WORKER RIGHTS

October 31, 2023

*The NLRB issued three decisions this summer that collectively show its predisposition to erring on the employee's side when employee rights compete with workplace rules and directives.*

### **Board Restores Protections for Employees Who Advocate for Others**

In *American Federation for Children, Inc.* (decided August 25<sup>th</sup>), the Board overturned its longstanding precedent that limited protections for employees who advocate for non-employees, such as contract laborers. Specifically, the Board found that advocating for non-employees can be protected concerted activity under Section 7 of the National Labor Relations Act (NLRA) if there might be ancillary benefits to the organization's employees. For example, if contractor laborers are demanding higher wages or better working conditions, regular employees who support them may be protected from disciplinary action by the employer under the concept of "mutual aid and protection." The Board also expanded the application of this concept to include situations where employees advocate for immigrants applying for work.

### **Board Returns to "Totality of Circumstances" Test for Determining Concerted Activity**

In *Miller Plastic Products, Inc.* (decided August 25<sup>th</sup>), the Board issued a decision returning to the long-established test for determining whether an employee who intends to induce group action by fellow employees engages in "protected concerted activity," thus obtaining protection for that activity under Section 7 of the NLRA. In this decision the Board reaffirmed the principle that the question of whether an employee has engaged in concerted activity is a factual based analysis based on the totality of circumstances. In prior decisions, the Board had utilized a narrower standard in determining whether the activity was specifically targeted at "wages, terms and conditions of employment" as referenced in the Act, which cloaks that activity under Section 7's protections from employer discipline. In applying this broader standard, the Board stated, "The right of employees to engage in concerted activity to improve

their working conditions is central to the National Labor Relations Act, and the Board should not artificially constrain the definition of 'concerted activity.'" For example, if an employee is complaining about the organization's outdated equipment, work hours or lack of adequate paid time off, that conduct is now perhaps protected under Section 7.

### **Board Adopts New Standard for Assessing Lawfulness of Work Rules**

In *Stericycle, Inc.* (decided August 2<sup>nd</sup>), the Board adopted a new standard for evaluating employer work rules challenged as facially unlawful under Section 8(a)(1) of the NLRA. In its decision the Board explained that, in its view, prior rulings on this issue permitted employers to adopt overbroad work rules that chill employees' exercise of their right under Section 7 of the NLRA. Notably, the Board said that some work rules, such as attendance policies and confidentiality rules should no longer be held as per se lawful, regardless of the employer's interests in drafting those policies. Instead, the general counsel has the ability and burden to show that the challenged work rule has a tendency to chill employees from exercising their Section 7 rights. If the general counsel accomplishes this, then the work rule is presumptively unlawful. The employer must then respond with evidence showing there is no more narrowly tailored rule that will accomplish its objectives. The *Stericycle* decision shifts the burden on the employer to show the propriety and necessity of its work rule as written, at the peril of it being ruled unlawful by the Board.

### **Conclusion**

These three decisions collectively show a trend with the NLRB to interpret the Act in such a way that prioritizes protection of employee activity that in their view promotes the Act's stated goals of improving wages, terms and conditions of employment, which can include the establishment of a union presence in the workplace.

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